

JAN 23 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL T. DAVITT,

Plaintiff - Appellant,

v.

DR. CENTRIC; DR. SPERO,

Defendants - Appellees.

No. 07-16411

D.C. No. CV-06-00502-HDM

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Nevada  
Howard D. McKibben, District Judge, Presiding

Submitted January 13, 2009<sup>\*\*</sup>

Before: O'SCANNLAIN, BYBEE, and CALLAHAN, Circuit Judges.

Michael T. Davitt, a Nevada state prisoner, appeals pro se from the district court's judgment dismissing pursuant to 28 U.S.C. § 1915A his 42 U.S.C. § 1983

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

action for failure to pay the partial filing fee. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion, *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002), and we vacate and remand.

The district court dismissed the action without determining whether Davitt had funds to pay the partial filing fee at the time payment was ordered. If Davitt lacked funds to pay the fee, the district court should not have dismissed the action. *See* 28 U.S.C. § 1915(b)(1), (4); *Taylor*, 281 F.3d at 850 (“[A] district court cannot dismiss an IFP prisoner’s case based on his failure to pay the initial fee when his failure to pay is due to the lack of funds available to him when payment is ordered.”). Accordingly, we vacate and remand for further proceedings.

**VACATED and REMANDED.**